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KLUANG HEALTH CARE SDN BHD v. LEE YONG BENG & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[ORIGINATING SUMMONS NO: 24C(ARB)-6-01-2015
B & 24C(ARB)-14-03-2015]
10 SEPTEMBER 2015

ARBITRATION: *Award – Setting aside – Disputes arising from building contract – Claims for supply of materials, structural and architectural works – Counterclaim* C *for back charges for works done by third party and for liquidated and ascertained damages – Whether arbitrator's award against public policy – Whether contained decision on matters beyond scope of submission to arbitration – Whether arbitrator exceeded jurisdiction and acted outside scope of arbitral authority – Whether application to set aside filed within time – Arbitration Act 2005, ss. 37 & 42*

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LIMITATION: *Arbitration – Awards – Application to set aside arbitration award – Disputes arising from building contract – Claims for supply of materials, structural and architectural works – Counterclaim for back charges for works done by third party and for liquidated and ascertained damages – Whether application to set aside* E *arbitration award filed within time – Whether court had jurisdiction to extend time – Arbitration Act 2005, ss. 37 & 42*

The plaintiff ('the applicant'), the turnkey contractor engaged by the Ministry of Health to construct a new hospital in Johor ('the project'), had appointed the defendant ('the respondent') to construct part of the structural and architectural works of buildings in the project. Disputes ensued and the F matter was first brought to the High Court by way of a civil action by the respondent. However, on application by the applicant, the action was stayed and all disputes between the parties were referred to arbitration. At the arbitration, the respondent made various claims including for supply of materials and for structural and architectural works. The applicant denied the G claims and argued that the respondent did not complete the works and had in fact abandoned the site. The applicant submitted that the materials were paid for and counterclaimed for back charges for works done by others and for liquidated and ascertained damages ('LAD'). The arbitrator awarded the applicant the sum of RM678,388.06 for unpaid materials supplied but found H that (i) the applicant's allegation that the respondent had left the site was not convincing; (ii) the applicant's claims for back charges for works done were unproven since the documents relied on were either not substantiated, not safe or unsatisfactory; (iii) the applicant failed to comply with cl. 4 of the underlying contract in that no notice of its intention to give work to third I parties was ever given to the respondent; and (iv) the evidence produced to support the applicant's claim for LAD was unsatisfactory. Dissatisfied with the findings of the arbitrator, the applicant filed the present application to set aside the award pursuant to ss. 37 and 42 of the Arbitration Act 2005 ('the

Act'). The applicant submitted that (i) the award was against Malaysian public policy and contained decisions on matters beyond the scope of the submission to arbitration; and (ii) there was failure to give effect to the terms of the contract thereby resulting in the arbitrator exceeding his jurisdiction and acting outside the scope of his arbitral authority. In objecting to the applicant's application on the ground of delay, the respondent argued that s. 42 requires the applicant to refer the relevant questions of law within 42 days from the date of publication or receipt of the award (and not after 47 days as happened here). The respondent sought to recognise and enforce the award under s. 38 of the Act but the applicant refuted it by arguing that no original arbitration agreement or award was produced in court.

Held (ordering corrective award as binding and enforceable):

(1) The applicant was expected to prove the allegations made on a balance of probabilities in order that the discretion to set aside the award may be exercised in its favour. However, the applicant failed to discharge this burden. The applicant had not shown how the matters complained of did not fall within the terms of submission to arbitration; how the arbitrator's decision on these matters complained of was beyond the scope of submission to arbitration; or even how the award conflicted with the Malaysian public policy. All the applicant had done was to recant its disagreement and allegations. These allegations were general and vague. No evidence had been offered to substantiate or prove the allegations. (paras 33 & 34)

(2) Section 37(2) of the Act serves to provide some examples of what may be considered as conflicting with the public policy of Malaysia and it would be those awards which were induced or affected by fraud or corruption; or where there was a breach of natural justice. The applicant had not even cared to identify which public policy was under consideration. There was absolutely no allegation or evidence of any fraud, corruption or breach of natural justice which may conflict with public policy of Malaysia. (paras 34 & 36)

(3) All that the court heard was the applicant's dissatisfaction with the manner in which the arbitrator construed and interpreted the sub-contractual terms and obligations; that such construction and interpretation was apparently contrary to the clear terms of the sub-contracts and read not in the applicant's favour. Such an argument is hardly enough to count as meeting the high threshold set in s. 37 of the Act. It is precisely the function of the arbitrator to construe the terms and conditions of the relevant contract, and be satisfied that there was sufficient proof of the respective heads of claim and counterclaim before making the appropriate orders. (paras 36 & 37)

(4) It was entirely within the purview of the arbitrator to make his decision on the matter submitted to him. He had done so by examining the underlying sub-contracts, evaluated the evidence led by both sides, addressed the law and applied it to the facts presented before he made his conclusions. His conclusions were drawn after both sides were heard and such conclusions were supported by evidence that he found relevant and of weight. Most importantly, his decisions on the matters were necessary since there were the very matters referred or submitted to him for determination. (para 40)

(5) The award was originally sent to the parties around 24 November 2014. A correction was sought by the applicant. The corrective award was read out or published by the arbitrator on 11 December 2014. A copy of the corrective award was however only received by the applicant on 15 December even though the respondent received its copy on 12 December 2014. The application to refer questions of law under s. 42 of the Act must be made within 42 days of the receipt of the corrective award. Therefore, the application must be made on or before 26 January 2015. The present application was clearly filed out of time as it was filed on 30 January 2015. The court has to decline the application to extend time because there is no jurisdiction to extend time given the mandatory language in sub-s. 42(2) and the constraints in s. 8 of the Act. (paras 44, 45 & 47)

(6) The requirements of s. 38 of the Act have been met. The court was satisfied that it had the proper arbitration agreement. By virtue of s. 9(5) of the Act, there was an arbitration agreement by incorporation. Furthermore, the applicant had itself relied on this same arbitration agreement when it sought and was granted by the High Court, a stay of the respondent's civil action and had the subject matter referred to arbitration. That course of action had culminated in the arbitration award. The applicant could not resile and deny the existence of the arbitration agreement. (paras 59, 60 & 61)

Case(s) referred to:

Associated Engg Co v. Government of AP AIR [1992] SC 232 ***(refd)***

International Bulk Carriers SPA v. CTI Group Inc [2014] 8 CLJ 854 CA ***(refd)***

Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & Another Case [2013] 4 CLJ 1172 HC ***(refd)***

Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***

Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157 ***(refd)***

Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd (2003) 5 SCC 705 ***(refd)***

Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd [2010] 5 CLJ 83 HC ***(refd)***

The Government of India v. Cairn Energy India Pty Limited & Ors [2013] 1 LNS 1323 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 9(5), 10, 35(2), 37, 38, 42(2)
Contracts Act 1950, s. 40

(Originating Summons No: 24C(ARB)-6-01-2015)
For the plaintiff - Azura Adnan; M/s Kevin & Co
For the defendant - Thamil Chelevan; M/s CS Tam & Co

(Originating Summons No: 24C(ARB)-14-03-2015)
For the plaintiff - Thamil Chelevan; M/s CS Tam & Co
For the defendant - Azura Adnan; M/s Kevin & Co

Reported by Najib Tamby

JUDGMENT

Mary Lim J:

[1] These two substantive matters before the court were dealt with together as the applications concern the same corrective arbitration award of 11 December 2014. The parties have filed affidavits and affidavits-in-reply to the respective originating summonses.

[2] In Originating Summons No. 24C(ARB)-6-01-2015, the applicant, Kluang Healthcare Sdn Bhd, seeks to set aside the corrective arbitration award under sub-paras. 37(1)(a)(iv), (v) and 37(1)(b)(ii); para. 37(2)(b); and s. 42 of the Arbitration Act 2005 (Act 646). The respondent is Lee Yong Beng (trading as Yong Seng Construction Work). In Originating Summons No. 24C(ARB)-14-03-2015, the respondent, as the applicant, is seeking to recognise and enforce that same arbitration award under s. 38 of the same Act. Although there are some particular grounds relied on by Kluang Healthcare to oppose the respondent's application for recognition and enforcement, the main grounds are substantially the same as those relied on to set aside the corrective award. In any case, the parties agree that the respondent's application for recognition and enforcement will be disposed according to the outcome of the applicant's application under ss. 37 and 42.

[3] For ease of reference, I shall refer to Kluang Health Care Sdn Bhd as the "applicant" and Lee Yong Beng as the "respondent".

Background Facts

[4] The applicant was the turnkey contractor engaged by the Ministry of Health to construct a new hospital in Kluang, Johore (the project). The applicant appointed a company known as Isyoda (M) Sdn Bhd as its main contractor. That company appointed the respondent as one of its subcontractors to carry out certain works at the project. Isyoda (M) Sdn Bhd subsequently withdrew from the contract. That contract was then terminated.

[5] The applicant subsequently took over from Isyoda and appointed the respondent to construct part of the structural and architectural works of various buildings in the project. Two letters of award were issued by the applicant to the respondent for this purpose. The terms in both subcontracts are similar.

[6] Disputes arose between the parties which were at first brought to court by way of a civil action by the respondent. However, on application by the applicant, the action was stayed and all disputes between the parties were referred to arbitration.

Arbitration Proceedings

[7] At the arbitration, the respondent made various claims including claims for supply of materials; and for structural and architectural works. Those claims were denied by the applicant who maintained that the respondent did not complete the works and that the materials had been paid for. The applicant counterclaimed for back charges for work done by others and for liquidated and ascertained damages (LAD).

[8] The arbitration was conducted over a space of ten days. A substantial amount of documentary evidence was put before the arbitrator. Both parties called five witnesses each to testify at the arbitration proceedings. Both parties filed written submissions.

[9] After evaluating the oral and documentary evidence and the submissions made, the arbitrator allowed the respondent's claims but the quantum of the claims was based on the valuations of the applicant. The applicant's counterclaim was dismissed for lack of evidence.

[10] The arbitrator recognised early that the parties had differing positions as to whether the respondent had completed the works as it had claimed; or it had in fact abandoned the site as suggested by the applicant. This was important as the applicant's counterclaim related to back charges for work done by others and for LAD.

[11] The arbitrator found from the oral and documentary evidence that the respondent was in fact still on site post May 2010 in contrast to the applicant's allegation that the respondent had left the site in April or May 2010. The arbitrator found the applicant's position on this allegation "quite weak" after examining the evidence; the witnesses were not able to say what happened on site and neither were witnesses brought from the site to testify. On the other hand, he found the respondent's witness (Chong Sun Ching CW2) (para. 22 of the award) truthful and he accepted his evidence that the respondent was still on site as claimed.

[12] In relation to the respondent's particular claims, the arbitrator considered each item of claim, evaluated the evidence and the submissions made by both parties before rendering his decision on each of these items. For the claim on materials, paras. 24 to 32 show the arbitrator considering the evidence before holding at para. 32:

> I, therefore, am of the view that the more plausible evidence was that of CW1 and, as such, I accept his explanation and allow the claim of the Claimant. I, therefore, award the Claimant the sum of RM678,388.06 for materials supplied but remains unpaid.

[13] For the claims for structural and architectural works, there is no doubt that the arbitrator examined the underlying contract and its terms. However, he found the conduct of the parties "most unsatisfactory in respect of as built drawings after construction" as none was produced despite its requirement as proof of measurement of the value of work done. He then relied on the next best evidence which was the construction drawings and the evidence of the witnesses who testified at the arbitration proceedings.

[14] The arbitrator was in no doubt that the respondent had done work, "it is a question of quantum" - see para. 53. From his reading of cls. 8.0 and 11.1 of the sub-contract which he felt ought to be read together, the arbitrator found "that the proper procedure was that there should have been a joint inspection. When that was completed and the values being set out and, if there is disagreement, then the respondent's figures will have to be accepted. However, this procedure was not followed. In the circumstances, I have to decide, which valuation would be best. I have found that both parties have used methods, which allows for some amount of uncertainty".

[15] However, after "giving it some serious consideration", the arbitrator "decided that the values as provided by the respondent should be accepted solely on the ground that the claimant would have had to accept the figures, if the correct procedure had been adopted." He did so, because "I have no other method of evaluation". Hence, he followed the claims procedure under cl. 8.0(a). The arbitrator followed the same methodology and reasoning in respect of the respondent's claim for architectural works - see paras. 40 to 54; and 67 to 74 of the award.

[16] Before he finally decided on whether the claims would be awarded, the arbitrator also examined the applicant's claims for back charges for materials, claims which were denied by the respondent. The arbitrator concluded that the applicant had not proved its claims here. As for the applicant's claims for work given to third parties, the arbitrator found that the applicant had not complied with cl. 4.0 of the underlying contract in that no notice of its intention to give work to third parties which was required under cl. 4, was ever given to the respondent. The notice requirements were read strictly as decided in the case of *Nirwana Construction Sdn Bhd v. Pengarah Jabatan Negeri Sembilan Darul Khusus* [2008] 4 MLJ 157. The arbitrator found that such failure rendered the applicant as the party in breach of the contract and the work given to third parties as unlawful. Consequently, any claim for such work could not be charged to the respondent.

[17] As a result of all these findings, the arbitrator found the applicant's claim for back charges "not acceptable". Amongst his reasons too, were because the documents relied on were either not substantiated; not safe or unsatisfactory - see para. 65 of the award.

[18] On the applicant's claim for LAD, the arbitrator found the evidence produced to be "unsatisfactory in terms of the standard of proof. For completeness, the applicant's claim for LAD was also dismissed". The reasons are to be found at para. 21 and of the award:

(a) a failure to properly assess the exact amount of LADs;

(b) the imposition by the employer did not clearly identify the cause of the delay being attributed to the claimant;

(c) there was no evidence to suggest that they had calculated the actual loss due to the delay as required pursuant to s. 75 of the Contracts Act.

[19] The arbitrator made this same conclusion in respect of LAD at para. 67 of the award.

Application Under s. 37

[20] The applicant's application to set aside the corrective award is opposed. Mid-stream during submissions at the hearing of these proceedings, the applicant abandoned its arguments under s. 37 in relation to the claim for materials supplied. The arguments in relation to the rest of the award were maintained. Consequently, all references and arguments on this item of award are disregarded.

[21] These are the provisions of s. 37:

Application For Setting Aside

37(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of sub-paragraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[22] The applicant claims that the award deals with a dispute not falling within the terms of the submission to arbitration; that it contains a decision on matters beyond the scope of the submission to arbitration; and that the award is in conflict with the public policy of Malaysia.

[23] The applicant further makes its case that the award ought to be set aside because it is erroneous as it does not accord with the evidence, the documents presented at the arbitration proceedings and the pleaded case before the arbitrator. Learned counsel for the applicant pointed out the salient terms of the sub-contracts which were supposedly ignored by the arbitrator.

[24] In the case of the first letter of award for the architectural works, cl. 2.0 of the subcontract provided that the sub-contract was for a provisional sum of RM8,631,882.69. Clause 7.0 provided that the commencement date is 1 March 2009 and the completion date is 30 November 2009 with the applicant being entitled to impose LAD of RM2,800 per day. The defects liability period of the subcontract is 24 months from the date of practical completion in respect of the main contract - see cl. 10.0 which also provided that the respondent was not to receive payment for unsatisfactory works until such rectification works have been fully completed to the applicant's satisfaction. Under cl. 4 of the supplementary terms, the applicant is entitled

to appoint third party contractors to carry out and complete any works which have been delayed or will be delayed in part or as a while and deduct the costs incurred from any amounts due to the respondent.

[25] These terms are substantially mirrored in the second letter of award for the structural works save for details on the provisional sum and the dates of commencement and completion.

[26] Learned counsel for the applicant submitted that the manner in which the arbitrator dealt with and decided the dispute also did not fall within the terms of submission to arbitration. By this, the applicant meant that:

(i) the arbitrator had failed to decide on the LAD issue despite it being clear and undisputed fact by the respondent that it did not complete both the structural and architectural work within the periods stipulated in the respective subcontracts and for which the applicant would be entitled under cl. 7.0 to impose LAD;

(ii) the arbitrator had failed to consider the fact that the respondent had failed to prove that they had submitted the Daily Work Progress Form; and that these forms did not reflect the applicant's acknowledgement;

(iii) the arbitrator had failed to consider the undisputed fact that the respondent had left the site without completing the works and the applicant, pursuant to cl. 4.0 of the subcontract had to appoint a third party to continue and/or complete the respondent's works.

[27] It is the applicant's submission that as the innocent party under s. 40 of the Contracts Act, it was entitled to elect to affirm the contract and claim damages; or terminate and make a claim for damages where there was this fundamental breach by the respondent to complete the works within the time stipulated in the sub-contracts. It elected on the former. The applicant contends that it was entitled to impose LAD and to claim damages for delay in completion in the face of delay and non-completion of the works by the respondent. In not allowing its claim and in disregarding cl. 7.0 in his decision, the applicant maintains that this "conscious disregard of the provisions of the contract by the arbitrator from which he has derived his authority, vitiates the award ..."

[28] The applicant submits that the arbitrator ought to have "base his authority from the contract entered between the parties. Failure to give effect to the terms of the contract and/or disregard the terms of the contract would amount to exceeding his jurisdiction and acting outside the scope of his arbitral authority". In support, the applicant cited the Supreme Court of India's decisions in *Associated Engg Co v. Government of AP* AIR [1992] SC 232 and *Oil & Natural Gas Corp Ltd v. Saw Pipes Ltd* (2003) 5 SCC 705. The applicant argued that with these clear terms in both subcontracts, the arbitrator could not have come to the decision that he did. The award therefore deals with a dispute not falling within the terms of submission to

arbitration, contains decisions on matters beyond the scope of submission to arbitration; and it conflicts with the public policy of Malaysia. Such an award must therefore be set aside under sub-paras. 37(1)(a)(iv), (v) and 37(1)(b)(ii); para. 37(2)(b).

[29] With respect, the court disagrees. Aside from the issue concerning the materials which has since been abandoned, the applicant's case under s. 37 is really this - it is dissatisfied that the respondent's claim was allowed; and its counterclaim disallowed. In my view, all these complaints raise by the applicant concerned findings of fact by the arbitrator. The applicant is not happy with the arbitrator's findings; but as master of the facts, he is obliged to make such findings of fact in order to decide the issues and the claim as well as the counterclaim. The court does not disturb findings of fact; and has no inclination to do so.

[30] On the exercise of discretion of intervention in arbitration matters, the Court of Appeal in the case of *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 laid down the following views:

> The Underlying Policy Considerations
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> [10] Underlying these detailed legal arguments is the important issue of the extent to which courts should interfere with an arbitration award in the context of the Act which has made it clear in s. 8 (as amended) that no court shall intervene in matters governed by the Act "except where so provided in [the] Act." The policy to be adopted by our courts is that of minimal intervention consistent with the policy underlying the UNCITRAL Model Law, which Malaysia has incorporated with suitable amendments. Section 37 mirrors the Model Law (Article 34). However, s. 42 has no direct equivalent provision in the Model Law. Nevertheless, this court has to carefully consider whether we should strictly construe and adhere to the principles of party autonomy, finality of arbitration awards and minimal court intervention rigidly on the facts of this appeal, even though in the context of a domestic arbitration. We have kept these issues uppermost in mind, since the grounds advance by *Perwira Bintang* and addressed by the learned judge in the High Court, have brought these issues to the fore.
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> [11] Suffice for us to refer to our Federal Court judgment in *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 and *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 as authorities in point.
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> [12] In *The Government of India v. Cairn Energy India Pty Ltd & Anor*, *supra*, Richard Malanjum CJ (Sabah & Sarawak) held:
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> > We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations - one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the

A learned arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.

And as Scrutton LJ put it " ... if you refer a matter expressly to the arbitrator and he makes an error or law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment. (see *African & Eastern (Malaya) Ltd v. White, Parlmer & Co Ltd* (1930) 36 L1 L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v. Dato' Teong Teck Leng* [1996] 1 MLJ 178 ..." (at p. 462)

[13] In *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal*, *supra*, Ramly Ali JCA (now FCJ) stated:

Section 37(1) of the Arbitration Act 2005 provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court's discretion in setting aside the arbitral award is now limited to the narrowly defined circumstances in line with modern international practice. The effect of the present ss. 8, 9, 37 and 42 of the Arbitration Act is that the court should be slow in interfering with an arbitration award ... (at p. 405)

...

The Findings Of this Court On s. 37 And The Policy Considerations

[39] We have considered the appeal record, in particular the reasoning and findings of the arbitrator. In as much as our courts must embrace the principles of finality of awards, party autonomy and minimal court intervention in the context of the Model Law legal regime, and the more general considerations that our courts should be arbitration-friendly and pro-enforcement, we cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues. If four issues have been agreed, the arbitrator cannot, on his own volition, add another issue (particularly without prior consensus and after the close of the case of the parties), for to allow this will result in gross unfairness. On the facts of this case, *Perwira Bintang* had lost its opportunity to introduce evidence through witnesses, if need be, to establish the length and quantity of hard rock bored, or even to prove by evidence that it would be commercially impractical to do so ...

[31] Section 8 of the Arbitration Act 2005 therefore clearly reminds the court of a minimalistic approach when it comes to arbitration and arbitral awards; and the courts have been extremely mindful of this caution. The parties have made their choice for dispute resolution loud and clear; and the court is merely giving effect to that choice. The court does not sit in appellate capacity over these arbitral awards; hence the applicant's complaints are a non-starter.

[32] The applicant relies on the grounds found in under sub-paras. 37(1)(a)(iv), (v) and 37(1)(b)(ii); para. 37(2)(b). These provisions must be read subject to para. 37(1)(a). Under sub-para. 37(1)(a), the court can set aside the award only if the applicant provides proof of the various matters complained of. The standard of proof is one of a balance of probabilities. I had discussed these requirements in some detail in the case of *Government of India v. Cairn Energy India Pty Limited & Ors* [2013] 1 LNS 1323; [2014] 9 MLJ 149 which decision was affirmed by the Court of Appeal. From para. 120 of the said judgment, I had expressed as follow:

> [120] From the terms of these sub-paragraphs, it is evident that the Court is here vested with discretion to intervene in the Award. Subsection 37(1) uses the word "may" as opposed to the word "shall", the latter often treated as mandatory in its dictate and application. See for example, sections 8, 10 and 41(2) in Act 646.
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> [121] How this discretion is to be exercised, is as I have said earlier, guided by the best practices under the Model Law regime; subject to any specific requirements of Act 646 in general, and sub-paragraph 37(1)(a)(iv) and (v) and (b)(ii), in particular. It goes without saying that this discretion must also be exercised judiciously.
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> [122] Within subparagraphs 37(1)(a)(iv) and (v) is also this clear restriction, and that is the discretion ought to be exercised only and only if it is proved to the Court the matters complained of. First of all, the phrase "only if" is indicative of the intention of Parliament that the Courts be conferred a limited discretion. By limited, it is to say that the discretion is subject to the provision of proof of any or all the matters complained of in (a)(i) to (vi) and/or (b)(ii).
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> [123] In this case, since the Plaintiff is relying on sub-paragraphs 37(1)(a)(iv) and (v); and (b)(ii), the Plaintiff has to provide proof that there is evidence of the Arbitral Tribunal having rendered an award which "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration"; or "subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration"; or that it is an award that is in conflict with the public policy of Malaysia.
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> [124] It is not enough to make general allegations of such grounds without providing any evidence. It also goes without saying that the absence of such evidence must mean necessarily result in a refusal of the order(s) sought. To my mind, the presence of these two requirements suggests a "minimalist" intervention approach ought to be adopted when dealing with challenges on these grounds.
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> [125] I find further support of this view in the requirement of "proof" as opposed to there being none called for; or a requirement on a lower evidentiary threshold when dealing with a challenge under sub-paragraphs 37(1)(a)(iv) and (v). The choice of this word is deliberate. It is also a stringent requirement of the sufficiency of evidence that must be brought before the Court. As compared to the phrase "appear" which is used in

some legislations (see for example section 360 of the Capital Markets and Services Act 2007 [Act 671]) where a lower standard of proof is required, the deliberate choice of the word "proof" indicates that there must be certainty in proof.

[126] Insofar as the standard of proof is concerned, it must be on the civil balance of probabilities; and not the higher burden of beyond reasonable doubt. It is only where the Court is satisfied that there is evidence certain of the matters alleged that the Court has discretion to intervene for the purposes of setting aside the Award. Where the Court is not satisfied, it may be argued that there is no discretion at all. Again, this would be due to the presence of the clear emphatic words of "only if".

[127] The requirement of "proof" is also to be found in section 39 of Act 646. Although this requirement is in relation to the grounds for refusing recognition or enforcement of an award [note the earlier observations of the UNCITRAL Secretariat's Explanatory Note on this], the approach of other Courts concerning such a requirement is of good guidance. In this respect, the House of Lords' decision in *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 813 is of some relevance.

[128] Lord Mance JSC opined that the respondent in that case had taken the "correct position" on the issue of who bears the onus of proving the matters alleged of; that it was with the party objecting to the recognition of the award; that the "objecting party has the burden of proof, which it may seek to discharge as it sees fit". Therefore, the burden of proving the present grounds of challenge lies with the Plaintiff.

[33] The applicant is therefore expected to prove the allegations made on a balance of probabilities in order that the discretion to set aside may be exercised in its favour. The burden remains with the applicant throughout the application. Having examined the cause papers and having heard the submissions of learned counsel, I do not find this burden discharged. The applicant has not proved the matters complained of in which case, the court must necessarily dismiss the application.

[34] I agree with the respondent that all that the applicant has done here is to recant its disagreement and allegations. These allegations are very general and vague. No evidence has been offered to substantiate or prove the allegations. The applicant has not shown to any degree how the matters complained of do not fall within the terms of submission to arbitration; how the arbitrator's decision on these matters complained of is beyond the scope of submission to arbitration; or even how the award conflicts with the public policy of Malaysia. On the public policy ground, the applicant has not even cared to identify which public policy is under consideration.

[35] In the same decision of *Government of India v. Cairn Energy India Pty Limited & Ors*, I had also considered the allegation of breach of public policy; what it means and what an applicant has to show in order to successfully rely on this ground to set aside an award. From para. 140 of the judgment, I had opined:

[140] The Plaintiff has also relied on sub-paragraph 37(1)(b)(ii) as a ground to setting aside the Award, and that is, the Award is said to be in conflict with the public policy of Malaysia.

[141] Model Law recognises that each State has its own concept of what is required of "public policy". Nevertheless, it may be said that since sub-paragraph 37(1)(b)(ii) is subject to the same overlying conditions as sub-paragraphs 37(1)(a)(iv) and (v), and that is it is discretionary, having regard to the context of the dispute, that it arises out of commercial and contractual transactions where parties have received more than adequate advice, including legal counsel; and that bargains are arms' length, the public policy that is envisaged in this provision must be read narrowly and more restrictively.

[142] Although there appears to be no requirement of "proof" in this sub-paragraph, and whilst the question of what amounts to "public policy" may be a difficult one, I would also venture to say that the Court nevertheless requires sufficient basis for such allegation or ground in order that it may "find" that "the award is in conflict with the public policy of Malaysia". This requirement extends to not only identifying the particular public policy of Malaysia which is said to be conflicted but also to providing basis of the alleged conflict; that is how it is conflicted or breached; and how the breach has prejudiced the rights of the plaintiff.

[143] This makes the threshold high in that by its very nature, it should be immediately obvious or at least fairly rapidly apparent that there has been such a breach or conflict with the public policy of Malaysia Court. From the reasons offered, the Court must be compelled to agree or that a strong case has been made out that the award conflicts with the public policy of Malaysia. Otherwise, the contractual arrangements of the parties must be maintained. These views were expressed in *Hebei Import & Export Corp v. Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111; and *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554 @ p 565, 570, and I agree that it should be the case here.

...

[152] It is clear that while subsection 37(2) serves to provide some examples of what may be considered as conflicting with the public policy of Malaysia; and it would be those awards which were induced or affected by fraud or corruption; or where there is a breach of natural justice, as is the case with proper statutory interpretation, any other complaint of conflict with public policy must fall within this genre as set out in paragraphs 37(2)(a) and(b). Quite undisputedly, these two areas may be said to fall within the basic and fundamental notions or principles of justice.

[36] There is absolutely no allegation or evidence of any fraud, corruption or breach of natural justice which may be said to fall within the conflict with public policy of Malaysia ground. All that the court hears is the applicant's dissatisfaction with the manner in which the arbitrator construed and interpreted the sub-contractual terms and obligations; that such construction and interpretation was apparently contrary to the clear terms of the subcontracts and read not in the applicant's favour.

[37] Such an argument is hardly enough to count as meeting the high thresholds set in s. 37. It is precisely the function of the arbitrator to construe the terms and conditions of the relevant contract, be satisfied that there is sufficient proof of the respective heads of claim and counterclaim before making the appropriate orders. As submitted by the respondent, the evidence shows that the applicant was in fact given the fullest opportunity to present its case. Just that the arbitrator was not convinced; and the arbitrator has set out his reasons for his findings and conclusions.

[38] In *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & Another Case* [2013] 4 CLJ 1172, Lee Swee Seng JC (as he then was) made similar observations when dismissing an application to set aside an arbitration award under s. 37. His Lordship was of the view that proof was required instead of mere regurgitations of the relevant subsections of the law and the making of general allegations:

> (2) *Niche Properties*' originating summons and supporting affidavit had merely made general allegation without providing any proof whatsoever as expressly provided in s. 37(1)(a) of the Act. If regurgitated the relevant sub-sections of s. 37(1) without providing any proof thereof. The court only had a better inkling of the actual proof by reading the written submission of learned counsel for *Niche Properties*. The court was minded to dismiss *Niche Properties*' application to set aside the Award on this ground alone of not furnishing proof *via* affidavit evidence. (para 18)

[39] See also *Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83 where Hamid Sultan Abu Backer JC (as he then was) said:

> (b) In addition the complaint of the plaintiff plainly falls within the scope and jurisdiction of the arbitrator. The AA 2005 does not permit the court to intervene in matters which does not strictly fall within any of sub-section of s. 37. In consequence general allegations are not sufficient as it is mandatory requirement for the need of proof. For example, in this case the plaintiff alleges breach of rules of natural justice without setting out the prejudice suffered and proof thereof. Further, almost all rules of natural justice are now incorporated in the Federal Constitution, relevant Acts, as well as rules of court etc. Thus, the complaint now must in almost all cases relate to one of the breaches of the Constitution, or any Act of Parliament, rules of court etc. General complaint of breach of natural justice *per se* in this time and era will stand as an embarrassing plea. Court does not ordinarily entertain the plea and has placed various strictures. I have dealt with this area of jurisprudence and the relevant case laws in *Bintang Merdu Sdn Bhd v. Tan Kau Tiah @ Tan Ching Hai & Anor & Another Cases* [2009] 1 LNS 621. The relevant part reads as follows:
>
> > In *Malloch v. Aberdeen Corporation* [1971] 1 All ER 1278, Lord Wilberforce asserted that a breach of procedure, whether called a failure of natural justice, or an essential administrative fault cannot give a remedy in the courts, unless behind it there is something of

substance which has been lost by the failure. In *R v. Secretary of State for Transport, ex parte Gwent County Council* [1978] 1 All ER 161, the Court of Appeal held that unless prejudice is established to have resulted in the procedural impropriety, the appellate court will not interfere in the decision. In *R v. Secretary of home Department, ex parte Mughal* [1973] All ER 796, it was stated that the rules of natural justice should not be allowed to be exploited as a purely technical weapon to undo a decision which does not in reality cause substantial injustice. Further, the court asserted that the rules of natural justice must not be stretched too far.

(c) The plaintiff is also seeking relief pursuant to s. 42. Section 42 makes it mandatory for the question of law to be framed. In the instant case, the plaintiff has adopted the allegation and grounds relating to the relief they were attempting to claim under s. 37 and with some level of ingenuity repeats the issues as questions of law. The manner the issues are framed shows substantial level of prolixity and ought to be dismissed *in limine*.

(d) When relief under s. 42 is sought there is a duty and obligation to state the question of law arising from the award in a concise manner, and state the grounds on which the reference is sought; in addition, I will say, must state the facts leading to grounds, failing which the relief will not be granted. In the instant case, the requirement of s. 42 was not satisfied. (see *Tarapore and Co v. Cochin Shipyard Ltd Cochin* [1982] 25 SCC 680). The question of law framed *prima facie* must not also be in relation to matters the court is prohibited to interfere within the spirit and intent of AA 2005. I will go to the extent of saying that when questions of law are framed the applicant must also clearly explain in the affidavit that the said question is permissible pursuant to AA 2005. This will ensure court's time is not unnecessarily wasted by the necessity of going into the merits of the application when the applicant in the first instance cannot pass the threshold test.

[40] It is entirely within the purview of the arbitrator to make his decision on the matters submitted to him. He had done so by examining the underlying sub-contracts, evaluated the evidence led by both sides, addressed the law and applied it to the facts presented before he made his conclusions. His conclusions were drawn after both sides were heard and such conclusions were supported by evidence that he found relevant and of weight. Most important, his decisions on these matters were necessary since these were the very matters referred or submitted to him for determination.

[41] I, therefore, do not find the applicant's complaints to be of any merit.

Application Under s. 42

[42] In relation to the application under s. 42, the first issue that is taken up by the defendant is that the application has been filed late. Section 42 requires that an application to refer questions of law arising out of an award

to the court for determination must be made within 42 days from the date of the publication and receipt of the arbitration award. The language in sub-s. 42(2) is clear and mandatory:

> 42. (1) Any party may refer to the High Court any question of law arising out of an award.
>
> (2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

[43] Although sub-s. 42(2) refers to the computation of time from the date of publication and receipt of award, I believe proper consideration should be given where the award was corrected by the arbitrator under the powers available under s. 35. Section 35 empowers the arbitrator, upon request of any of the parties, to correct errors in computation, any clerical or typographical error, or other error of similar nature; or to give an interpretation of a specific point or part of the award. Where the request is acceded to and it results in a correction or an interpretation of an award, sub-s. 35(2) provides that such correction or interpretation "shall form part of the award".

[44] In this case, the award was originally was sent to the parties around 24 November 2014. A correction was sought by the applicant. The corrective award was read out or published by the arbitrator on 11 december 2014. A copy of the corrective award was however, only received by the applicant on 15 December 2014 though the respondent received its copy on 12 December 2014.

[45] Accepting that the applicant received the corrective award on 15 December 2014, the application to refer questions of law under s. 42 must be made within 42 days of the receipt of the corrective award, the application must therefore be filed on or before 26 January 2015. The present application was filed on 30 January 2015. It is clearly filed out of time.

[46] Learned counsel for the plaintiff accepts that to be the case. Hence, she proceeded to the next argument; and that is to apply to extend time for making the application.

[47] In this regard, the court must decline. The court is of the view that there is no jurisdiction to extend time given the mandatory language in sub-s. 42(2) and the constraints in s. 8 of the Arbitration Act. The recent Federal Court's decision of *Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd (supra)* and the Court of Appeal's decision in *International Bulk Carriers SPA v. CTI Group Inc* [2014] 8 CLJ 854; [2014] 6 MLJ 851 highlight the mandatory language of the Arbitration Act 2005 and the need for strict compliance to its provisions; and that the court's intervention should be slow when considering whether to exercise its

discretion to intervene to set aside an arbitration award. There are no provisions within either s. 42 or anywhere in the Arbitration Act 2005 for the court to consider such an application. With the reminder in s. 8, the court is disinclined to say that it has jurisdiction to extend time.

[48] In any event, the reasons given by the solicitors are not befitting the grant of an extension even if for a moment the court has such jurisdiction. The applicant has cited an oversight for such failure to meet the time lines set in s. 42: see para. 12 of affidavit in support (encl. 2):

> Saya selanjutnya menyatakan bahawa saya telah dinasihatkan oleh peguamcara saya yang mana saya percaya bahawa untuk suatu rujukan kepada persoalan undang-undang menurut Seksyen 42 Akta Timbangtara 2005. Pemohon harus memfailkan permohonannya di Mahkamah Tinggi dalam tempoh 42 hari dari tarikh Award tersebut disiarkan dan diterima. Saya sesungguhnya dengan suci hati mengatakan bahawa berlaku kelewatan yang tidak disengajakan dalam membangkitkan rujukan kepada persoalan undang-undang di sini bukanlah disengajakan dan/atau tidak menghormati Mahkamah Yang Mulia.

[49] With respect, this is not sufficient. The applicant was legally represented at the material time and it ought to have been mindful of its options under the Arbitration Act 2005 especially since as early as when it filed its application for stay under s. 10 when the respondent first filed its claim in the High Court in Johor Bahru.

[50] This means that the application pursuant to s. 42 must therefore fail from the start or at the outset.

[51] To be a proper and valid question of law within s. 42, the following conditions, as expressed in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* must be met. The Court of Appeal at p. 636 said:

> Some Governing Principles Under s. 42
>
> [57] On the present case authorities, a number of propositions can be stated as guidelines. We enumerate these below, without intending them to be exhaustive, since clearly the law has to be developed further.
>
> (a) The question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83; *Maimunah Deraman v. Majlis Perbandaran Kemaman*, *supra*;
>
> (b) The grounds in support must also be stated on the same basis;
>
> (c) The question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd*, *supra, Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd supra*);
>
> (d) The party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) The question of law must be a legitimate question of law, and not a question of fact "dressed up" as a question of law (*Georges SA v. Trammo Gas Ltd (The Belarus)* [1993] 1 Lloyd's Rep 215);

(f) The court must dismiss the reference is a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd*, *supra*);

(g) This jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655);

(h) Nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) The arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Development (NZ) Ltd v. Doug Hood Limited* [2000] 3 NZLR 318); and

(j) While the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law) the court should not intervene unless the decision is perverse.

[52] I have decided to use the Bahasa Malaysia text of the six questions as the English translations appear to be somewhat confusing and to some extent, inaccurate.

(i) sama ada timbangtara boleh secara sah, dari segi undang-undang mengambil kira nilaian kerja yang dikemukakan oleh responden dalam pengiraan akhir bagi kerja-kerja structural works dan architectural works responden apabila penimbangtara sendiri telah memutuskan bahawa nilaian pemohon akan menjadi asas kepada pengiraan akhir kerja-kerja responden;

(ii) sama ada timbangtara boleh secara sah, dari segi undang-undang mengawardkan retention sum kepada responden apabila responden sendiri telah memecahi sub-kontrak tersebut;

(iii) sama ada penimbangtara boleh secara sah, dari segi undang-undang mengawardkan sejumlah RM50,082.65 bagi caj semula responden (respondent's back charges) apabila tiada sebarang bukti dikemukakan yang boleh menunjukkan bagaimana jumlah ini terakru;

(iv) sama ada Timbangtara boleh secara sah, dari segi undang-undang memutuskan bahawa sejumlah RM678,388.06 bagi barangan yang dibekalkan kepada pemohon adalah terhutang oleh pemohon apabila defendan sendiri mengakui bahawa bayaran-bayaran tersebut telah dibayar kepada pembekal-pembekal secara terus;

(v) sama ada timbangtara boleh secara sah, dari segi undang-undang memutuskan bahawa responden berada di tapak projek sehingga selepas Mei 2010 apabila daily work progress forms tersebut sendiri mencerminkan bahawa ianya tidak ditandatangani oleh pemohon; dan

(vi) sama ada timbangtara boleh secara sah, dari segi undang-undang menolak tuntutan LAD pemohon apabila responden sendiri mengakui terdapat kelewatan dan kerja-kerja tidak disiapkan sepenuhnya dan sub-kontrak mencerminkan LAD akan dikenakan bagi sebarang kelewatan kerja dan peruntukan Akta Kontrak 1950 juga membenarkan pemohon untuk menuntut LAD daripada responden.

[53] All six questions in essence are questions dealing with the exercise of discretion and the determination of the very issues posed. No principle of law is engaged. The questions posed deal with the findings of fact by the arbitrator and the arbitrator's interpretation and construction of the relevant terms and conditions of the sub-contracts as well as the application of the law to those findings of fact. In any case, the arbitrator gave his reasons for each of his conclusions or findings. The questions posed either ignore or do not take into account those findings or reasons.

[54] For instance, when dealing with the question concerning the retention sum, it presupposes that the arbitrator had made such a finding; that the respondent is in breach of the sub-contract. What had actually happened is that the arbitrator found the applicant in breach because its appointment of third parties was not in accordance with the terms of the sub-contract. Under such circumstances, the applicant was not entitled to keep the retention sum. Another instance is the question on the LAD, it, too presupposes that the delay was admitted. There is none from the terms of the award.

[55] Consequently, the questions posed are more in the nature of questions of fact or mixed fact; and far from being real questions of law within the meaning and intent of s. 42. None of these questions meet the requirements as set in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd*. No questions of law are therefore properly posed before the court.

[56] Furthermore, there is no claim of any substantial rights being affected. Under s. 42(1A), such absence is fatal; and understandably so. Arbitration awards are meant to be final and binding on the parties. The parties' recourse to the courts should only be in the limited circumstances as prescribed in the Act. These circumstances are read restrictively as intervention by the court and review of the award is discouraged.

[57] Lastly, I must add that in any case, I do not find anything wrong in the approach or principles understood and applied by arbitrator. Accordingly, the application under s. 42 must also be dismissed.

[58] The court next turns to the application by Lee Yong Beng for an order under s. 38 of the Arbitration Act. Kluang Healthcare Sdn Bhd objects to the application for recognition and enforcement on the basis that the mandatory requirements of s. 38 are not met. It contends that no original arbitration agreement or award and, certainly no certified true copy of the arbitration agreement or the award have been produced in court. Under such circumstances, the application must be dismissed.

[59] The court disagrees. The court is satisfied that it has before the court the proper arbitration agreement. By virtue of s. 9(5) of the Arbitration Act, there is an arbitration agreement by incorporation. The Federal Court's decision in *Ajwa for Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* is also relevant:

> [23] On the first question, we need to consider the relevant ss. 9(3), 9(4) and 9(5) of the Arbitration Act 2005. Sections 9(3) and 9(4) provide that the arbitration agreement must be in writing and the writing requirement is satisfied if the arbitration agreement is in a document signed by the parties or is in an exchange of letters, telex, facsimile or other means of communication which provide for a record of the agreement. As such, we are of the view that such a written agreement to arbitrate does not mean a formal agreement executed by both parties, so long as the arbitration agreement is incorporated into a written document. Section 9(5) further provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement provided that the arbitration agreement is in writing and the reference is such as to make the clause part of the agreement.
>
> [24] It is settled law that an agreement to arbitrate must be in writing; but it is not the law that such an agreement must be signed. The Court of Appeal in the case of *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741 ruled as follows:
>
> > It follows that in the present instance it is not necessary for the first respondent, in order to succeed, for it to produce an agreement to arbitrate that is signed by the appellant before us. Suffice that there is such an agreement. In support of the learned judge's finding, learned counsel for the first respondent has placed reliance on the settlement agreement and in particular s. 1.02 of the recitals which we have already reproduced earlier in this judgment. The submission is that the sub-contract and the letter of award have been incorporated into the settlement agreement. Since the appellant is a party and a signatory to the settlement agreement, it is bound by the arbitration clause in the sub-contract. The appellant however contends that there has been no incorporation in the present case.
>
> [25] In another case, *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665 the court said:
>
> > … The phrase written agreement in s. 2 of the Act does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement. This principle is amply covered by authority.
> >
> > (Although the above case was based on the 1952 Act, it applies with equal force to s. 9 of the Arbitration Act 2005).

A

> [26] On the above authorities, we are of the view that the sales contracts which expressly incorporated the respondent's standard terms and conditions, which in turn contained the arbitrations agreement (as in cl. 31 thereof) satisfy the writing requirements under s. 9(4) and 9(5) of the Arbitration Act 2005 to constitute a valid arbitration agreement between the parties, even though the said arbitration agreement was not signed by the appellant.

B

[60] There are further reasons why I am satisfied that the requirements of s. 38 have been met. The applicant had itself relied on this same arbitration agreement when it sought and was granted by the High Court, a stay of the respondent's civil action and had the subject matter referred to arbitration. That course of action has culminated in the arbitration award. I do not believe the applicant can make any credible or convincing argument that there is no arbitration agreement in this case bearing in mind the history and genesis of this arbitration award. The applicant cannot reside and deny the existence of the arbitration agreement.

C

D

[61] Further, and in any case, I am satisfied that both the arbitration agreement (through the certified true copies of the letters of award and the award) and the award which are before me have been properly certified for the purpose and use of s. 38 of the Arbitration Act 2005.

E

[62] The court accordingly orders that the corrective award of 11 December 2014 be recognised as binding and be enforced by entry as a judgment of the High Court on terms of the corrective award.

[63] The court finally orders the single order of costs of RM10,000 as reasonable and suitable for both originating summonses.

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